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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

8 THE GRAY PANTHERS OF SAN FRANCISCO, et al.,

Plaintiffs,

No. C 09-2307 PJH

V.

ARNOLD SCHWARZENEGGER, et al.,

Defendants.

**ORDER DENYING MOTION FOR
PRELIMINARY INJUNCTION; ORDER
GRANTING MOTION TO DISMISS**

14 Plaintiffs' motion for a preliminary injunction and the motion of defendants Arnold
15 Schwarzenegger and David Maxwell-Jolly to dismiss the complaint came on for hearing
16 before this court on August 19, 2009. Plaintiffs appeared by their counsel Lynn S. Carman,
17 Jessie M. Sandoval, and Stanley L. Friedman; and defendants appeared by their counsel
18 Deputy Attorneys General Karin S. Schwarz and Joshua N. Sondheimer. Defendant John
19 Chiang also appeared, by his counsel Daniel J. Powell.

Having read the parties' papers and carefully considered their arguments and the relevant legal authority, and good cause appearing, the court hereby DENIES the motion for preliminary injunction and GRANTS the motion to dismiss.

BACKGROUND

24 This is a case challenging the implementation of certain provisions of California
25 Assembly Bill (AB) X3 5, Stats. 2009-2010., 3rd Exec. Sess., c.20 (AB 5). The challenged
26 provisions, codified at California Welfare and Institutions Code § 14131.10(b)(1), eliminate
27 payment under Medicaid, as of July 1, 2009, for certain “optional” Medicaid services.

28 Plaintiffs bring this action under the Supremacy Clause, Art. 6, cl. 2 of the United

1 States Constitution, seeking injunctive and declaratory relief. Plaintiffs allege that the
2 implementation of § 14131.10(b)(1) conflicts with the federal American Recovery and
3 Reinvestment Act of 2009 (“ARRA”), and that § 14131.10(b)(1) is therefore preempted.
4 Plaintiffs now move for a preliminary injunction, and defendants move to dismiss the
5 complaint.

6 A. The Medicaid Act

7 Medicaid is a cooperative federal-state program that provides federal financial
8 assistance to participating states to reimburse certain costs of medical treatment for the
9 poor, elderly, and disabled. 42 U.S.C. § 1396. To qualify for federal matching funds,
10 known as the Federal Medical Assistance Percentage (FMAP),¹ a state must establish and
11 administer its Medicaid program through a state plan approved by the Secretary of Health
12 and Human Services (HHS). Id. § 1396a.

13 A state that participates in Medicaid must determine which services it will provide.
14 See id. § 1396d(a). To receive federal approval, a state plan is required to include seven
15 enumerated medical services. Id. §§ 1396a(a)(10), 1396d(a)(1)-(5), (17), (21) (including as
16 mandatory: inpatient hospital, outpatient hospital, laboratory and x-ray, nursing facility,
17 physician, nurse-midwife, and nurse-practitioner services). A state may also elect to
18 provide optional services, such as dental services, prosthetics, and prescription drugs. See
19 id. §§ 1396a(a)(10)(A), 1396d(a).

20 The state must designate a “single state agency” to be responsible for administration
21 and supervision of the state plan. Id. § 1396a(a)(5). Once designated as the single state
22 agency for Medicaid, this agency may not delegate the administration of the program or
23 any activities related to rule-making and policy development to any entity other than its own
24 officials. 42 C.F.R. § 431.10(e). California participates in Medicaid through the Medi-Cal

25

26 ¹ FMAP is defined in the Medicaid Act as, “for any State[,] . . . 100 per centum less the
27 State percentage. . . . “ The “State percentage” is “the percentage which bears the same ratio
28 to 45 per centum as the square of the per capita income of such State bears to the square of
the per capita income of the continental United States (including Alaska) and Hawaii” with
some modifications. Id. § 1396d(b).

1 program, and has designated the Department of Health Care Services (DHCS) as the
2 single state agency responsible for administration of the Medi-Cal program. Cal. Welf. &
3 Inst. Code § 10740, 14000, et seq.

4 The receipt of federal funding is expressly conditioned on compliance with the
5 Medicaid Act, and HHS is authorized to withhold funds for noncompliance. 42 U.S.C.
6 § 1396c; see also 42 C.F.R. § 430.35. The Centers for Medicare & Medicaid Services
7 (CMS) is the federal agency that administers the Medicaid program on behalf of the
8 Secretary of HHS. See Pharmaceutical Research & Mfrs. of America v. Walsh, 538 U.S.
9 644, 650 n.3 (2003).

10 B. Enactment of ABX3 5

11 At issue in the present action is the California Legislature's decision in February
12 2009, as part of its response to the State's fiscal emergency, to eliminate some (but not all)
13 of the optional benefits previously offered under Medi-Cal.

14 On December 19, 2008, the Governor of California declared a fiscal emergency and
15 directed the California legislature into a special session. The Governor noted that
16 there was an approximately \$15 billion General Fund deficit for the 2008-2009 fiscal year
17 that, if unaddressed, would grow to \$42 billion with the next 18 months. Therefore, the
18 Governor stated that "immediate and comprehensive action to reduce current spending
19 must be taken to ensure, to the maximum extent possible, that the essential services of the
20 State are not jeopardized and the public health and safety is preserved."

21 The Legislature enacted a series of budget measures in response, including, in
22 February 2009, ABX3 5 as urgency legislation to take effect immediately. ABX3 5, which
23 became effective on March 3, 2009, made a number of reductions to various state
24 programs. In the present action, plaintiffs challenge the provision codified as Welfare and
25 Institutions Code § 14131.10(b)(1), which "exclude[s] from coverage under the Medi-Cal
26 program," effective July 1, 2009, the following optional benefits: adult dental services,
27 acupuncture services, audiology services and speech therapy services, chiropractic
28 services, optometric and optician services, podiatric services, psychological services, and

1 incontinence creams and washes (“the nine Medicaid services”).

2 Dental services remain covered if they constitute “[m]edical and surgical services
3 provided by a doctor of dental medicine or dental surgery, which, if provided by a physician,
4 would be considered physician services, and which services may be provided by either a
5 physician or a dentist in this state.” Cal. Welf. & Inst. Code § 14131.10(b)(2).

6 In addition, the nine optional Medicaid services are covered if they are pregnancy-
7 related; or if they are provided to beneficiaries under the Early and Periodic Screening
8 Diagnosis and Treatment Program, or provided to beneficiaries receiving long term care in
9 certain nursing facilities licensed by the State. Id. § 14131.10(b)(3) & (c). The State
10 anticipates that the implementation of § 14131.10(b)(1) will result in \$129.4 million in
11 savings to General Fund expenditures in the 2009-2010 fiscal year.

12 C. The American Recovery and Reinvestment Act

13 Congress enacted ARRA on February 17, 2009. H.R. 1, 111th Cong., Pub. L. No.
14 111-5 (1st Sess. 2009). At issue here is a provision of Title V of ARRA. Title V provides
15 “state fiscal relief,” during a limited period of economic downturn (October 1, 2008 through
16 December 31, 2010). This “state fiscal relief” comes in seven forms – a temporary increase
17 in Medicaid FMAP payments, ARRA § 5001; a temporary increase in DSH
18 (disproportionate share hospitals) allotments during the recession, id. § 5002; an extension
19 of moratoria on certain Medicaid final regulations, id. § 5003; an extension of transitional
20 medical assistance, id. § 5004; an extension of the qualifying individual program, id.
21 § 5005; protections for Indians under Medicaid and CHIP, id. § 5006; and funding for
22 oversight and implementation, id. § 5007.

23 Congress expressly stated that the purposes of Title V are (1) “[t]o provide fiscal
24 relief to the States in a period of economic downturn[;” and (2) “[t]o protect and maintain
25 State Medicaid programs during a period of economic downturn, including by helping to
26 avert cuts to provider payment rates and benefits or services, and to prevent constrictions
27 of income eligibility requirements for such programs, but not to promote increases in such
28 requirements.” Id. § 5000(a).

Under ARRA, qualifying states receive a general 6.2 percent increase in their FMAP, and states with relatively high growth in unemployment rates receive additional increases based on quarterly unemployment statistics. Id. § 5001(b), (c).

In order to receive enhanced FMAP, a state may not restrict eligibility “standards, methodologies, or procedures” beyond those in effect on July 1, 2008. Id. § 5001(f)(1). In addition, a state is also ineligible for enhanced FMAP “if any amounts attributable (directly or indirectly) to such increase are deposited or credited into any reserve or rainy day fund of the State.” Id., § 5001(f)(3).

D. CMS Guidance to States Regarding Implementation of ARRA

Since February 2009, CMS has issued several letters and fact sheets to assist the states in complying with ARRA’s requirements. CMS has made clear that ARRA prohibits states from restricting eligibility for Medicaid, as distinct from the medical services provided under the Act. Thus, in a recent communication, CMS explained that a state could eliminate Medicaid services without jeopardizing enhanced FMAP:

Question 19: Can States modify or eliminate services, as opposed to eligibility criteria, and still qualify for the increased FMAP?

Answer: If the change in the service has no potential impact on an individual’s ability to maintain Medicaid eligibility, such a change would not disqualify a State from the increased FMAP.

CMS, “American Recovery and Reinvestment Act of 2009 - Frequently Asked Questions from States, July 7, 2009,” attached as Exhibit A to Declaration of Toby Douglas, filed herein on July 26, 2009, at 8; see also id. (response to Question 20: reduction in optional services provided would not disqualify a State from receiving FMAP because no beneficiaries would lose eligibility).

CMS has also explained that “[t]he availability of increased FMAP funding will free-up State funds, which may be spent on activities that may or may not be related to the Medicaid program.” Id. at 12 (“Answer” to Question 31); see also id. at 12-13 (“States may use this freed up State money to fund other programs within the State, such as education, or to maintain aspects of their Medicaid program that may have been previously cut due to

1 budgetary constraints.”).

2 E. Procedural Background

3 The present action was filed by six plaintiffs. Two are seriously disabled California
4 Medi-Cal beneficiaries – Mark Beckwith and Margaret Dowling. The third is an organization
5 that advocates on behalf of the elderly – The Gray Panthers of San Francisco. The
6 remaining three plaintiffs are nonprofit organizations that advocate for and provide health-
7 care services to (among others) Medicaid beneficiaries – California Foundation for
8 Independent Living Centers, Inc., Independent Living Center of Southern California, Inc.,
9 and Lifelong Medical Care.

10 Originally named as defendants were Arnold Schwarzenegger (“Schwarzenegger”),
11 Governor of California; Kim Belshé (“Belshé”), Secretary of California’s Health and Human
12 Services Agency; David Maxwell-Jolly (“Maxwell-Jolly”), Director of California’s Department
13 of Health Care Services (“DHCS”) and the State official responsible for the administration of
14 the MediCal program; John Chiang (“Chiang”), Controller of the State of California; Bill
15 Lockyer (“Lockyer”), Treasurer of the State of California; and Michael E. Genest (“Genest”),
16 Director of the California Department of Finance.

17 Plaintiffs filed the first amended complaint (“FAC”) on June 30, 2009, alleging four
18 causes of action. Plaintiffs subsequently dismissed the third cause of action, and also
19 dismissed defendants Belshé and Genest from the case.

20 In the first and second causes of action, plaintiffs seek to enjoin implementation of
21 Welfare & Institutions Code §14131.10(b)(1), on the grounds that the mandated cuts
22 conflict with two provisions of ARRA – the “purpose clause” (§ 5000(a)), and the provision
23 in § 5001(f)(3) that a state will be ineligible for increased FMAP if it deposits the enhanced
24 FMAP funds in a reserve or rainy day fund (§ 5001(f)(3)). In the fourth cause of action,
25 plaintiffs seek, in the event that injunctive relief is denied, a judicial declaration that
26 § 14131.10(b)(1) is contrary to and is preempted by ARRA.

27 Plaintiffs allege that the increased FMAP for the State of California for the 18-month
28 recession adjustment period will amount to an annual savings to the State of \$6.6 billion

1 during the fiscal years 2008-2009 and 2009-2010. They contend that the annual cost to the
2 State to furnish the nine Medicaid services is \$124.6 million – a small percentage of the
3 total the State will be receiving in enhanced FMAP funds.

4 Plaintiffs now seek a preliminary injunction, and Schwarzenegger and Maxwell-Jolly
5 seek an order dismissing the complaint for failure to state a claim and for lack of subject
6 matter jurisdiction.

7 DISCUSSION

8 A. Motion for Preliminary Injunction

9 In their motion for preliminary injunction, plaintiffs seek an order enjoining
10 enforcement of the reductions mandated by § 14131.10(b)(1), and requiring defendants to
11 “use and deploy the savings” resulting from the enhanced FMAP reimbursements under
12 ARRA to avert such cuts. In the event that defendants do not restore the nine Medicaid
13 services, plaintiffs seek an order requiring them to refrain from accepting any additional
14 enhanced FMAP funds, and to return all such funds already received.

15 1. Legal Standard

16 Plaintiffs seeking a preliminary injunction in a case in which the public interest is
17 involved must establish that they are likely to succeed on the merits, that they are likely to
18 suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips
19 in their favor, and that an injunction is in the public interest. California Pharmacists Ass'n v.
20 Maxwell-Jolly, 563 F.3d 847, 849 (9th Cir. 2009) (citing Winter v. Natural Resources
21 Defense Council, Inc., 129 S.Ct. 365, 376 (2008)); see also Munaf v. Geren, 128 S.Ct.
22 2207, 2218-19 (2008).

23 2. Plaintiffs' Motion

24 Plaintiffs argue that they meet all the requirements for preliminary injunctive relief.
25 First, they assert that they have established a likelihood of success on the merits of the first
26 and second causes of action. With regard to the first cause of action, they contend that the
27 language of § 5000(a) compels the conclusion that a state that accepts enhanced FMAP
28 amounts under ARRA may not allow the savings it achieves to “sink into the State’s

1 fungible assets" and, at the same time, eliminate services to its Medicaid beneficiaries; but
2 must, rather, employ the savings resulting from the enhanced FMAP funds to avoid having
3 to cut its own Medicaid services during the period of economic downturn.

4 With regard to the second cause of action, plaintiffs argue that § 5001(f)(3), when
5 read together with § 5000(a), establishes that defendants have a mandatory ministerial
6 duty not to accept enhanced FMAP funds with one hand, and cut services with the other
7 while contributing funds to a reserve or rainy-day fund. They claim that because the State
8 of California is accepting the FMAP enhancements, which will save the State approximately
9 \$3 billion, it cannot then turn around and cancel services worth only \$129 million a year on
10 the ground that it can not afford them.

11 Second, with regard to irreparable injury, plaintiffs cite to declarations detailing the
12 ways in which the elimination of the nine Medicaid services will affect Medicaid
13 beneficiaries, and will lead to increased pain and suffering, as well as the possibility of
14 developing other medical conditions. Plaintiffs also contend that the organizational plaintiffs
15 will suffer irreparable injury on their own account, as they will be impeded in their ability to
16 carry out functions for which they are organized to provide – to enable the blind, elderly,
17 and disabled of our population to obtain adequate medical care and to achieve and
18 continue independence.

19 Third, plaintiffs argue that the balance of hardships tips strongly in their favor. They
20 argue that the State will suffer no financial loss because it is receiving \$3.76 billion extra
21 funds from the enhanced FMAP payments, out of which to pay the relatively small amount
22 of \$129.4 million that will be cut as a result of eliminating the nine Medicaid services.

23 Finally, plaintiffs assert that the public interest strongly favors granting relief, as the
24 requested injunctive relief carries out Congress' express purpose to protect and maintain
25 and not cut Medicaid services, and because our society as a whole suffers when we
26 neglect the poor, the hungry, and the disabled.

27 In opposition, defendants argue that the motion must be denied because plaintiffs
28 cannot establish the elements necessary for preliminary injunctive relief. Defendants focus

1 primarily on the question whether plaintiffs have demonstrated a likelihood of success on
2 the merits. Defendants contend that plaintiffs cannot show a likelihood of success on the
3 merits because § 14131.10(b)(1) does not conflict with § 5000(a) or with § 5001(f)(3). In
4 addition, defendants assert, plaintiffs' claims fail as a matter of law because the ARRA
5 provisions at issue are not privately enforceable.

6 Defendants assert that § 14131.10(b)(1) does not conflict with § 5000(a) because
7 the "purpose clause" is advisory or hortatory, not mandatory, and therefore cannot support
8 a cause of action. In addition, they note that the stated purpose of ARRA Title V is to "help[
9] to avert cuts to provider payment rates and benefits or services," § 5000(a)(2) (emphasis
10 added), and contend that nothing in ARRA precludes the states from cutting benefits or
11 services, which is what the State of California has done here, as distinct from tightening
12 eligibility requirements, which it has not.

13 Defendants point to comments by Senator Chuck Grassley, who spoke out against
14 H.R. 1 when it was being debated in the Senate. Senator Grassley opposed the bill
15 because while it told states not to restrict Medicaid eligibility, it did not tell them that they
16 could not cut payments and services. See 115 Cong. Rec. S1474, S1513 (Feb. 4, 2009)
17 (statement of Sen. Grassley). Defendants also point to statements by Senator Grassley
18 regarding a proposed amendment that would have prevented states from cutting benefits
19 and provider payment rates as a condition of receiving enhanced FMAP payments, see 115
20 Cong. Rec. S2009-2010, 2013-2014 (Feb. 9, 2009) (statements of Sen. Grassley), and
21 note that the amendment was not passed by the Senate.

22 Defendants contend that § 14131.10(b)(1) also does not conflict with § 5000(f)(3), as
23 nothing in the State statute requires or authorizes the deposit of enhanced FMAP into a
24 rainy-day fund, or even mentions the disposition of the enhanced FMAP funds. In addition,
25 defendants argue that the allegations that defendants have "allowed savings resulting to
26 the State from enhanced FMAP . . . to sink into the fungible funds of the State of California"
27 rather than to be used directly for Medicaid, and that they have "s[u]nk" the enhanced
28 FMAP "to be reserved, used as a rainy day fund," FAC ¶ 41, are entirely conclusory and

1 therefore insufficient to state a claim under the standard recently articulated by the U.S.
2 Supreme Court in Ashcroft v. Iqbal, 129 S.Ct. 1937, 1950 (2009).

3 Defendants submit that even were these allegations adequately pled, the claim
4 would fail as a matter of law because nothing in the test of § 5001(f)(3) prohibits the State
5 from applying savings resulting from enhanced FMAP to offset non-Medicaid expenditures.
6 Defendants contend that CMS confirmed as much in its guidance to the States, when it
7 said that States “may use this freed up State money to fund other programs within the
8 State, such as education, or to maintain some aspects of their Medicaid programs that may
9 have been previously cut due to budgetary constraints.” Defendants argue that the federal
10 agency’s interpretation, which is consistent with the language of ARRA, is entitled to
11 substantial deference.

12 Defendants make two additional arguments in support of their assertion that plaintiffs
13 cannot show a likelihood of success. First, to the extent that plaintiffs allege that
14 implementation of § 14131.10(b)(1) will violate ARRA – as opposed to asserting that
15 § 14131.10(b)(1) is preempted by ARRA – defendants argue that plaintiffs’ claims fail as a
16 matter of law because the ARRA provisions at issue are not privately enforceable, as they
17 do not evince any Congressional intent to create either private enforceable rights or a
18 private remedy. Rather, defendants assert, it appears that Congress intended that the
19 obligation to enforce ARRA, and to impose remedies for noncompliance would lie with
20 CMS, as § 5001(g) provides for reporting by the states to CMS.

21 Second, defendants argue that the relief sought violates separation of powers. They
22 contend that the request that the court order the State to “cancel and withdraw all requests”
23 to amend the State plan to implement § 14131.10(b)(1), or the alternate request that if HHS
24 approves the proposed amendment, the State be ordered to re-amend its Medicaid plan to
25 restore the services, constitutes an effort by plaintiffs to disrupt and preempt the precise
26 means adopted by Congress for review of the State’s compliance with the Medicaid Act.

27 With regard to the remaining factors in the injunctive relief analysis, defendants
28 argue that plaintiffs have not met their burden of demonstrating irreparable injury, as the

1 individual declarants offer no competent evidence with regard to acupuncture, audiology,
2 speech therapy, chiropractic, and psychological services, and the organizational declarants
3 simply offer speculation unsupported by facts. Defendants also assert that plaintiffs have
4 not carried their burden with regard to adult dental services, optometric and optician
5 services, and incontinence creams and washes, as the evidence provided is speculative
6 and anecdotal.

7 Defendants contend that the factors of balance of hardships and the public interest
8 favor defendants, noting that the State of California is facing an unprecedented budget
9 crisis, and asserting that the State reduced Medicaid coverage of certain optional services
10 as a last resort (while retaining many optional coverages including coverage of prescription
11 drugs).

12 The court finds that the motion must be DENIED, as plaintiffs have not met their
13 burden of showing a likelihood of success on the merits. Specifically, they have not
14 established that § 14131.10(b)(1) is preempted by either § 5000(a) or § 5001(f)(3).

15 Federal preemption is premised upon the Supremacy Clause of the United States
16 Constitution. The Supremacy Clause invalidates all state laws that “interfere with, or are
17 contrary to,” federal law. Hillsborough County v. Automated Med. Labs., 471 U.S. 707, 712
18 (1985) (quoting Gibbons v. Ogden, 9 Wheat. 1, 22 U.S. 1, 82 (1824)). A plaintiff may bring
19 suit under the Supremacy Clause to enjoin implementation of a state law allegedly
20 preempted by federal statute, regardless of whether the federal statute at issue confers an
21 express “right” or cause of action on the plaintiff. Independent Living Ctr. of So. Calif. v.
22 Shewry, 543 F.3d 1047, 1048-49 (9th Cir. 2009).

23 Federal preemption analysis always starts with a question of congressional intent,
24 and then proceeds to a discussion of the state law’s interaction with the federal law or
25 regulation. See Wyeth v. Levine, 129 S.Ct. 1187, 1195 (2009); English v. General Elec.
26 Co., 496 U.S. 72, 78-79 (1990); see also Medtronic, Inc. v. Lohr, 518 U.S. 470, 485 (1996)
27 (“[t]he purpose of Congress is the ultimate touchstone’ in every preemption case”)
28 (quotation and citation omitted).

1 State action may be preempted by federal law in three ways – where Congress
2 expressly preempts state law; where Congress indicates by implication that federal law
3 shall exclusively occupy a field of regulation; and where state law conflicts with federal law.
4 Lorillard Tobacco Co. v. Reilly, 533 U.S. 525, 541 (2001).

5 Here, ARRA Title V contains no express statement of intent to preempt state law. In
6 addition, the court is unaware of any federal regulations that contain any such statement of
7 express preemption. Nor has Congress indicated by implication that federal law shall
8 exclusively occupy the field of regulation, as Medicaid is a cooperative federal-state
9 program, in which federal law imposes certain requirements, but in which the states also
10 play a role in deciding how the program will operate.

11 A conflict between state and federal law “arises when compliance with both federal
12 and state regulations is a physical impossibility or when state law stands as an obstacle to
13 the accomplishment and execution of the full purposes and objectives of Congress.”
14 Hillsborough, 471 U.S. at 713; see also Independent Living Ctr of So. Calif. v. Maxwell-
15 Jolly, 572 F.3d 644, 653 (9th Cir. 2009).

16 Plaintiffs allege in the FAC that the acceptance by the State of California of
17 enhanced FMAP funds (under ARRA)

18 was and is and subject to an express and implied requirement imposed by
19 Congress, in the purposes clause of § 5000 of the Enhanced FMAP Measure:
20 namely, that the State shall protect and maintain the State's Medicaid
21 program including averting cutting any services, (at least, so long as the State
enjoys savings from receipt of the enhanced FMAP funds which exceed the
cost of the Medicaid services it proposes to cut).

22 FAC ¶ 30. Although it is not entirely clear from the papers, plaintiffs' position, based on
23 statements of counsel at the hearing, appears to be that § 14131.10(b)(1) conflicts with
24 ARRA because compliance with both federal and state law is impossible, and because
25 state law prevents the full accomplishment of Congressional purposes.

26 The U.S. Supreme Court recently commented that “physical impossibility” may not
27 be the most appropriate standard for determining whether the text of state and federal laws
28 directly conflict. See Wyeth, 129 S.Ct. at 1208-09. In any event, the court finds nothing in

1 the text of the laws at issue here that suggests that it is impossible to comply with both
2 state and federal law, as § 14131.10 does not mention the use of the enhanced FMAP
3 funds, and nothing in Title V prohibits states receiving the enhanced FMAP funds from
4 cutting optional Medicaid services.

5 Thus, the court must consider whether state law stands as an obstacle to the full
6 purpose and objectives of Congress. With regard to § 5000(a), plaintiffs contend that
7 Congress provided the enhanced FMAP to the states so that they would not cut Medicaid
8 services, and that California's enactment of a law requiring the elimination of certain
9 "optional" Medicaid services stands as an obstacle to the accomplishment and execution of
10 that Congressional purpose.

11 With regard to § 5001(f)(3), plaintiffs appear to be arguing that because the cost of
12 the eliminated optional Medicaid services is less than the total amount the State of
13 California is to receive under the enhanced FMAP, the fact that the State is not using the
14 enhanced FMAP funds to pay for the optional services means that it is "indirectly"
15 depositing some of the FMAP funds into a reserve fund – which also stands as an obstacle
16 to the accomplishment and execution of Congressional purpose.

17 ARRA Title V is entitled "State Fiscal Relief," and, as described above, has a two-
18 fold purpose. Section 5000(a), subpart (2), is the clause at issue here. It sets forth a
19 general purpose, which is "to protect and maintain" state Medicaid programs during a
20 period of economic downturn. It then provides two ways in Title V is intended to protect
21 and maintain those Medicaid programs. The first way is "by helping to avert cuts to
22 provider payment rates and benefits or services." The second way is "by helping . . . to
23 prevent constrictions of income eligibility requirements for such programs, but not to
24 promote increases in such requirements."

25 The court agrees with defendants that subpart (2) is advisory or precatory, not
26 mandatory. See Pennhurst State Sch. & Hosp. v. Halderman, 451 U.S. 1, 24 (1981) (no
27 private cause of action because statute spoke in terms intended to be hortatory not
28 mandatory); Orkin v. Taylor, 487 F.3d 734, 739 (9th Cir. 2007) (under Cort v. Ash analysis,

1 reference to “the sense of Congress” was merely a precatory provision, not amounting to
2 positive, enforceable law); see also Wilder v. Virginia Hosp. Ass’n, 496 U.S. 498, 511
3 (1990) (elaborating on Pennhurst).

4 Plaintiffs contend that the first example – “by helping to avert cuts to . . . benefits or
5 services” – should be read as a statement of intent that states receiving the enhanced
6 FMAP payments are not permitted to cut any benefits or services that their Medicaid
7 beneficiaries had previously been receiving, even if those benefits or services are optional
8 under the Medicaid Act.

9 However, § 5000(a) it does not impose any “obligation” on the states, and also does
10 not mandate that the states categorically “avert cuts” to Medicaid programs. Section
11 5000(a) states that the enhanced FMAP payments are intended to “help avert” cuts to
12 benefits or services, not that the enhanced payments are meant to “prevent” such cuts. If
13 Congress had wanted to say that states receiving the enhanced FMAP payments were
14 required not to cut any benefits or services – in other words, that any state that cut benefits
15 or services would be ineligible for the enhanced FMAP payments – it could easily have
16 done so.

17 The second way in which the enhanced FMAP payments are intended to “protect
18 and maintain” Medicaid programs is by “helping . . . to prevent constrictions of income
19 eligibility requirements” for Medicaid. In § 5001(f)(1), Congress specifically provided that a
20 state would not be eligible for the enhanced FMAP payments “if eligibility standards,
21 methodologies, or procedures under its State plan . . . are more restrictive” than under the
22 plan that was in effect on July 1, 2008.

23 That is, under § 5001(f)(1), if a state makes it more difficult to qualify to be a
24 Medicaid beneficiary than it was as of July 1, 2008, that state will not be eligible for the
25 enhanced FMAP payments. However, there is no corresponding provision in § 5001 that
26 applies to the cutting of benefits or services. The fact that Congress did include the
27 limitation in § 5001(f)(1) indicates that it could also easily have included a prohibition
28 against cutting benefits or services if it wanted to, but chose not to.

1 In sum, the court finds that cuts in optional services mandated by Welfare and
2 Institutions Code § 14131.10(b)(1) do not stand as an obstacle to the accomplishment and
3 execution of the congressional purpose stated in ARRA § 5000(a) subpart (2). Accordingly,
4 plaintiffs have not established a likelihood of success as to the first cause of action.

5 Similarly, with regard to the second cause of action, the court finds that
6 § 14131.10(b)(1) does not stand as an obstacle to the accomplishment and execution of
7 Congressional purpose. As discussed above, nothing in § 14131.10(b)(1) requires or
8 authorizes the deposit of enhanced FMAP funds into a reserve or rainy day fund, or in any
9 way addresses the disposition of the funds. Accordingly, plaintiffs have not established a
10 likelihood of success as to the second cause of action.

11 Finally, plaintiffs cannot establish a likelihood of success on the fourth cause of
12 action if they do so as to the first and second causes of action, as the fourth cause of action
13 is entirely derivative of the first two causes of action.

14 Because the court finds that plaintiffs have not established a likelihood of success on
15 the merits, the court finds it unnecessary to address the remaining factors governing
16 motions for preliminary injunction.

17 B. Motion to Dismiss

18 Maxwell-Jolly and Schwarzenegger seek an order dismissing the complaint for
19 failure to state a claim and for lack of subject matter jurisdiction, arguing that § 14131.10
20 does not conflict with ARRA, and also asserting that there is no private right of action to
21 enforce §§ 5000 and 5001 of ARRA.

22 1. Legal Standards

23 a. Motions to Dismiss for Failure to State a Claim

24 A motion to dismiss under Rule 12(b)(6) tests for the legal sufficiency of the claims
25 alleged in the complaint. Ileto v. Glock, Inc., 349 F.3d 1191, 1199-1200 (9th Cir. 2003).
26 Review is limited to the contents of the complaint. Allarcom Pay Television, Ltd. v. Gen.
27 Instrument Corp., 69 F.3d 381, 385 (9th Cir. 1995). To survive a motion to dismiss for
28 failure to state a claim, a complaint generally must satisfy only the minimal notice pleading

1 requirements of Federal Rule of Civil Procedure 8. Rule 8(a)(2) requires only that the
2 complaint include a “short and plain statement of the claim showing that the pleader is
3 entitled to relief.” Fed. R. Civ. P. 8(a)(2).

4 A motion to dismiss should be granted if the complaint does not proffer enough facts
5 to state a claim for relief that is plausible on its face. See id. at 558-59. “[W]here the well-
6 pleaded facts do not permit the court to infer more than the mere possibility of misconduct,
7 the complaint has alleged – but it has not ‘show[n]’ – ‘that the pleader is entitled to relief.’”
8 Iqbal, 129 S.Ct. at 1950.

9 b. Motions to Dismiss for Lack of Subject Matter Jurisdiction

10 Federal courts are courts of limited jurisdiction, possessing only that power
11 authorized by Article III of the United States Constitution and statutes enacted by Congress
12 pursuant thereto. See Kokkonen v. Guardian Life Ins. Co. of America, 511 U.S. 375, 377
13 (1994). Thus, federal courts have no power to consider claims for which they lack subject-
14 matter jurisdiction. See Chen-Cheng Wang ex rel. United States v. FMC Corp., 975 F.2d
15 1412, 1415 (9th Cir. 1992).

16 The court is under a continuing duty to dismiss an action whenever it appears that
17 the court lacks jurisdiction. Billingsly v. C.I.R., 868 F.2d 1081, 1085 (9th Cir. 1989). The
18 burden of establishing that a cause lies within this limited jurisdiction rests upon the party
19 asserting jurisdiction. Kokkonen, 511 U.S. at 377; Tosco Corp. v. Communities for a Better
20 Env't, 236 F.3d 495, 499 (9th Cir. 2001).

21 2. Defendants' Motion

22 Defendants argue that the first two causes of action fail as a matter of law, for the
23 reasons argued in opposition to plaintiffs' motion for preliminary injunction, and assert that
24 the fourth cause of action fails because it is derivative of the first two causes of action.

25 With regard to the first cause of action, defendants assert that § 14131.10 does not
26 conflict with § 5000(a), because Title V's “purpose clause” is advisory or hortatory rather
27 than mandatory, and because nothing in ARRA precludes states from cutting “benefits or
28 services,” which is what the State of California has done here, as distinct from constricting

1 eligibility requirements, which it has not.

2 With regard to the second cause of action, defendants argue that § 14131.10 does
3 not conflict with § 5001(f)(3) because nothing in § 14131.10 requires or authorizes deposit
4 of enhanced FMAP into a rainy day fund, or addresses in any matter the disposition of the
5 funds.

6 Plaintiffs make the same arguments in opposition to the motion to dismiss as they
7 made in support of their motion for preliminary injunction. First, they contend that the
8 enhanced FMAP estimated to be received by the State will amount to approximately \$3.76
9 billion per year – a sum that the State would otherwise have had to expend for services in
10 the Medi-Cal program in California – and that the amount the State will save by cutting the
11 nine optional Medicaid services will be approximately \$129.4 million.

12 Plaintiffs argue that the refusal of the State to use any of the \$3.76 billion it is saving
13 to cover the cost of the \$129.4 million it is cutting violates the express “purpose clause” of
14 § 5000(a), which, plaintiffs assert, “expressly imposes upon the State and its officers the
15 obligation to protect and maintain the State’s Medicaid program by averting cuts to services
16 of the program;” and also violates the provision in § 5001(f)(3) that prohibits States from
17 directly or indirectly depositing the enhanced FMAP funds into a rainy-day fund. Plaintiffs
18 then argue that they are entitled to injunctive relief, for the same reasons as argued in their
19 motion for preliminary injunction.

20 The court finds that the motion must be GRANTED. To the extent that the FAC
21 alleges that § 14131.10(b)(1) is preempted by ARRA because it conflicts with federal law,
22 the motion to dismiss is granted without leave to amend. For the reasons stated above in
23 the discussion of plaintiffs’ motion for preliminary injunction, the court finds no express or
24 implied preemption, and no conflict between § 5000(a) and § 14131.10(b)(1), or between
25 § 5001(f)(1) and § 14131.10(b)(1).

26 The basis of plaintiffs’ suit is not entirely clear, however. While they allege in the
27 FAC that this is a case brought under the Supremacy Clause – that is, that both the first
28 and second causes of action are claims “[f]or injunction against each defendant, to enjoin

1 State action preempted under the Supremacy Clause" – they also allege, for example, that
2 § 14131.10 and "the policies and actions" of the defendants
3 constitute State action which is in violation of, hence preempted, under the
4 Supremacy Clause, by subd. (f)(3) of § 5001 and the purposes for which the
5 aforesaid subd. (f)(3) of § 5001 was enacted to accomplish, (namely to protect
and maintain the State's Medicaid program by averting cuts to Medicaid
services, as specified by § 5000(a)).

6 FAC ¶ 40.

7 In other words, they appear to be alleging both that § 14131.10.(b)(1) is preempted
8 by ARRA, and that in implementing the cuts mandated by § 14131.10(b)(1), defendants
9 have violated, or will violate, ARRA. In addition, plaintiffs argue in their opposition to the
10 motion to dismiss (as in their motion for preliminary injunction) that the cutting of the nine
11 Medicaid services "violates" ARRA – not just that § 14131.10(b)(1) is preempted by ARRA.

12 Accordingly, to the extent that plaintiffs intend to allege that in implementing
13 § 14131.10, defendants have violated (or will violate) ARRA, the court also finds that the
14 motion should be granted, without leave to amend as to the first cause of action, but with
15 leave to amend as to the second cause of action.

16 As to the first cause of action, amendment would be futile, because § 5000(a) is
17 advisory or hortatory rather than mandatory, and therefore cannot support a cause of
18 action. See Pennhurst, 451 U.S. at 24. It is true, as plaintiffs assert, that under Shewry, a
19 private party may seek declaratory and injunctive relief against the enforcement of a state
20 statutory scheme on the ground of federal preemption, even in the absence of an explicit
21 statutory provision establishing a cause of action, and regardless of whether the federal
22 statute at issue confers a "federal right" on the plaintiff. Id., 543 F.3d at 1058. Here,
23 however, plaintiffs have conflated the right to seek injunctive relief against the enforcement
24 of a state statute on the ground of federal preemption, with the right to bring a claim
25 alleging violation of a federal statute by state officials.

26 That is, while plaintiffs are permitted, under the rule stated in Shewry, to seek an
27 order enjoining the implementation of a state statute on the grounds that it is preempted by
28 federal law, the same analysis does not apply to a claim that a state official has violated

1 federal law by implementing the provisions of a state statute.

2 Under that second option, the issue is whether Congress intended that there be a
3 private right of action under the particular federal law at issue. Thus, the court must
4 determine whether Congress intended to create a federal right with its enactment. See
5 Gonzaga Univ. v. Doe, 536 U.S. 273, 283 (2002). This is because, like substantive federal
6 law itself, private rights of action to enforce federal law must be created by Congress. See
7 Alexander v. Sandoval, 532 U.S. 275, 286 (2001).

8 Here, because plaintiffs have confused the two issues (claim of federal preemption
9 vs. claim of violation of federal law), and the question is not adequately briefed, and the
10 court therefore does not decide whether or not Congress intended a private right of action,
11 but assumes – for purposes of this motion only – that it did so. In such a case, the ultimate
12 question with regard to the second cause of action – the claim that § 14131.10 violates the
13 provision in § 5001(f)(3) that the State is not eligible for enhanced FMAP payments if any
14 amounts attributable to increased FMAP are deposited into a rainy-day fund – is whether
15 the State is actually depositing any of the funds received under the FMAP enhancement
16 provision into a reserve or rainy-day fund.

17 Plaintiffs do not allege in the FAC any facts showing that such a fund exists or that
18 the State is depositing some of the money it is receiving under the FMAP enhancement
19 provision into said rainy-day fund. What plaintiffs do allege is that defendants “have
20 allowed savings resulting to the State from use of enhanced FMAP funds in the Medicaid
21 program[] to sink into the fungible funds of the State of California, to be reserved, used as
22 a rainy day fund, and spent for other purposes; – without using these savings to protect and
23 maintain the State’s Medicaid program including averting cuts in Medicaid services.” FAC
24 ¶ 41.

25 Defendants claim that there is no rainy-day fund. They submit a declaration by
26 Michael Genest (the Finance Director), stating that the State of California does not currently
27 have a reserve or rainy-day fund with money in it; and also stating that the funds being
28 provided under ARRA are being used for Medicaid purposes. For their part, plaintiffs do

1 not provide any evidence that the State is in fact depositing the funds into a rainy-day fund.
2 Nevertheless, in a Rule 12(b)(6) motion, defendants' evidence may not be considered by
3 the court.

4 The court agrees with defendants that under Iqbal, the second cause of action does
5 not allege sufficient facts to state a claim. Accordingly, the motion is granted with leave to
6 amend the second cause of action, to allege facts showing that the State has in fact
7 violated ARRA by depositing the enhanced FMAP funds into a rainy-day fund. Any
8 amended complaint must be filed no later than October 1, 2009.

9 Should plaintiffs choose to file an amended complaint, defendants may file a motion
10 to dismiss for failure to state a claim, and may also file a motion to dismiss on the ground
11 that there is no private right of action to assert a claim under ARRA.

12 **CONCLUSION**

13 In accordance with the foregoing, the court DENIES the motion for preliminary
14 injunction, and GRANTS the motion to dismiss, with leave to amend the second cause of
15 action only.

16
17 **IT IS SO ORDERED.**

18 Dated: September 1, 2009



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PHYLLIS J. HAMILTON
United States District Judge